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# AGGREGATION AND DIVISIBILITY OF DAMAGE FROM THE EUROPEAN CONFLICT OF LAWS PERSPECTIVE

Thomas Thiede\*

## I. Preliminary Remarks

Conflict of laws has changed fundamentally in the last decade(s) as a result of the activities of the European legislator. Alongside the international conventions and the – now sometimes overruled – national law, a set of unified rules applicable to cases with a relationship to a foreign jurisdiction and foreign law has been enacted on the European level. In almost all conflict of laws fields, the hitherto applicable national rules have been replaced by directly applicable European regulations, e.g. the rules on international jurisdiction in civil and commercial matters (Regulation 44/2001, hereafter ‘Brussels I Regulation’) as well as on the law applicable to non-contractual (“Rome II”) as well as contractual matters (“Rome I”), in all European Member States. 1

### A. The Basic Principles of Conflict of Laws

Basically, in all cases with a foreign element, e.g. when the damage is incurred in one state but the harm was actually caused in another, conflict rules set out to achieve two goals: Firstly, international cases should be decided in harmony, i.e. different judgments from different courts dealing with an identical case are to be avoided and secondly, every case should be subject to the law of the jurisdiction to which the closest connection exists; no national law should be applied to a case without any substantive connection to the geographical, personal or other general circumstances. 2

In order to secure these objectives, two fundamentally different but interrelated sets of rules must be applied concordantly. First of all, the rules on international jurisdiction must be consulted in order to find a court to determine the case. Secondly, the conflict rules provide the answer to the question which respective national substantive law should be applied by the court seised. Experience shows that some national courts tend to apply their own substantive law (*lex fori*) without any further consultation of the conflict rules because their *own* 3

\* I dedicate this paper to my parents, Dipl.-Ing. Hannelore and Dipl.-Ing. Hans-Jörg Thiede.

substantive law (scil. their *lex fori*) is the law the judges are most familiar with. However, this approach contradicts the principle of international legal harmony: Skipping the test on conflict of laws would allow the (merely allegedly legitimate) claimant to choose a court and thereby a legal system which does not have the closest connection to the case at hand but has other aspects favourable to the claimant, e.g. it may award very high amounts of damages or have a particular evidence scheme.<sup>1</sup> The conflict rules, as *meta-law*,<sup>2</sup> prevent this kind of *forum shopping* by assigning just one national law exclusively to the case, regardless of where the claim is litigated. However, this positive effect was subject to limitation since, up until the recent European unification, the conflict rules themselves were only national substantive rules: Different conflict rules, originating from different *leges fori*, assigned different national substantive laws to the one case. Therefore, the European harmonization of the rules on international jurisdiction and the conflict rules are of exceptional significance since their unification and the fact that they prevail over national law ease the above-mentioned problems to a very large extent: Basing their decision on the same rules to determine the competent court seised and the law applicable to cases with a foreign element, every European court of whatever national jurisdiction, refers ultimately to the same substantive law.

- 4 The considerations described above are the best example of the legal principles derived from the logics of conflict of laws on a methodological level. They are, however, only one part of the legal principles governing the methodology of this particular field of law. In addition, the general principles derived from the substantive law ultimately applied must always be considered when new conflict rules are to be put into legislation, existing rules are to be interpreted or when loopholes in the existing codes or case law have to be closed. Such an approach is constitutive, since last but not least substantive law, international jurisdiction and conflict rules are part of the same jurisdiction, which should not be contradictory in itself but establish a coherent system of legal rules.<sup>3</sup>

<sup>1</sup> It is, however, reasonable to recognize a right of a claimant to choose between different courts according to his specific action when it comes to certain fact patterns (infra no. 10). Such a choice is, however, regarded as *forum shopping* when it is made to alter that party's substantive legal entitlements to his own advantage or, accordingly, to the disadvantage of his opponents. As a result, the law would no longer be providing a certain and predictable norm, neutrally applied between the parties. Cf. *R.J. Weintraub*, Choice of Law for Quantifications of Damages, 42 *Texas International Law Journal* (Tex. Int'l L.J.) 311, 317. This principle is generally elaborated in *F. Bydlinski*, System und Prinzipien des Privatrechts (1996) 92 ff. and subsequently reintroduced to conflict of laws by, e.g. *S. Habermeyer*, Neue Wege zum Wirtschaftskollisionsrecht (1997) 191 ff.; *J. Kropholler*, Das Unbehagen am *forum shopping*, in: *Festschrift Firsching* (1985) 165 ff.; *C. von Bar*, Grundfragen des internationalen Deliktsrechts (Juristen Zeitung) JZ 1985, 961 ff.

<sup>2</sup> For this term consult *R. Wiethölter*, Begriffs- oder Interessenjurisprudenz – falsche Fronten im IPR und Wirtschaftsverfassungsrecht, in: *Festschrift Kegel* (1977) 213 ff.; *W. Müller-Freienfels*, IPR in der Normenhierarchie, in: *Festschrift Hellner* (1984) 369 ff.; *C. von Bar/P. Mankowski*, Internationales Privatrecht, vol. I (2003) no. 214; *T. Thiede/K. Ludwischowska*, Die Haftung bei grenzüberschreitenden unerlaubten Handlungen, *Zeitschrift für Vergleichende Rechtswissenschaft* (ZVglRWiss) 106 (2007) 92, 94.

<sup>3</sup> The consideration of these basic principles is last but not least demanded by fundamental rights in the respective national jurisdictions, the Charter of Fundamental Rights in the future Treaty

This is supported by the fact that most principles of substantive law are determined and well-documented on a broad comparative basis. Furthermore, it is easier to observe these principles at a supra-national level, since in this context the legislator is not constricted by individual national interests but broadened by supra-national ambition. Hence, supra-national comparative analysis of the law ultimately applied should be taken into consideration when any legislation or legal practice in the area of conflict of laws is concerned and must be considered when conflict rules are to be enacted or interpreted.

## B. Relevant scenarios for questions of aggregation and divisibility of damages

It should come as no surprise that an area of law which deals at best with questions of bilateral contracts or road traffic accidents as well as transnational marriages does not cover questions of aggregation and divisibility of damage to a great extent. Consequently, literature covering this specific question is almost absent. Furthermore, one has to be aware of the basic paradox of conflict rules: Specific legal concepts such as aggregation and divisibility of damage cannot be determined within the conflict rules since these rules contain material reference to the underlying legal problem only as far as the respective principles of the law ultimately applied are concerned.<sup>4</sup> Nevertheless, from the perspective of the logic of conflict of laws, one may quite bluntly assume that in general any aggregation of damage in terms of competent courts and applicable law certainly fits better into the above-described principles of this area of law: If damage is internationally split and occurs in several national jurisdictions, the efforts to have a single competent court and especially a single applicable law may be antagonized. 5

How divisibility of damage, e.g. in cases of different damage from the same cause, different consequential damage from the same direct damage and, finally, different damage from similar poses problems for the pursuit of the latter objectives of the conflict of laws regime is illustrated below by means of two different scenarios basically downgrading the specific problems in the Questionnaire to terms and realistic fact patterns in conflict of laws. 6

SCENARIO 1: One single tortfeasor causes a multitude of (direct and consequential) damage in different states.

SCENARIO 2: A multitude of tortfeasors cause one single damage in one state.

of Lisbon as well as European Convention of Human Rights. Cf. *H. Koziol/T. Thiede*, Kritische Bemerkungen zum derzeitigen Stand des Entwurfs einer Rom II-Verordnung, *ZVglRWiss* 106 (2007) 235, 239; *K. Siehr*, Wechselwirkungen zwischen Kollisionsrecht und Sachrecht, *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht (RabelsZ)* 37 (1973) 466, 475; *J. v. Hein*, Das Günstigkeitsprinzip im Internationalen Deliktsrecht (1999) 27; *C. von Bar*, Grundfragen des internationalen Deliktsrechts, *Juristenzeitung (JZ)* 1985, 961, 966.

<sup>4</sup> Scil. whether a liability is joint and solidary or not can *de facto* only be answered when the law applicable is already established.

## II. International Jurisdiction

### A. Introduction

- 7 The needs of the common European market means the European legislator has long been active in the area of international jurisdiction.<sup>5</sup> As early as in 1968 the Brussels Convention on Jurisdiction and the Enforcements of Judgments in Civil and Commercial Matters<sup>6</sup> was adopted by the Member States of the European Community and came into force in 1973 in the EC Member States at that time.<sup>7</sup> Subsequently, the Brussels Convention was amended by four accession conventions until it was replaced for fourteen<sup>8</sup> of the then fifteen EC Member States by Regulation 44/2001 on Jurisdiction and the Recognition and Enforcements of Judgments in Civil and Commercial Matters (“Brussels I Regulation”)<sup>9</sup> adopted by the EC Council in December 2000, which entered into force on 1 March 2002. The Regulation, like the Convention earlier, lays down rules on direct jurisdiction, applicable by the court seised of the original action in determining its own jurisdiction, and the recognition and enforcement of judgments given in other Member States of the European Union in which the Regulation applies. In contrast to the prior Convention, the Regulation is directly applicable in the Member States under art. 249 (2) EC Treaty.<sup>10</sup>
- 8 The material scope of the Brussels I Regulation is defined by its art. 1 where—under the Regulation applies only to civil and commercial matters. Hence, for the Brussels I Regulation to be applicable, the subject matter of the dispute must be of a “civil or commercial nature”.<sup>11</sup> Consequently, the Regulation does not apply to a dispute between a private person and a public authority arising out of acts by the public authority in the exercise of its powers as such, but on the other hand, is applicable when neither party to the dispute is a public body or where a public body was not acting in exercise of its official powers.<sup>12</sup>

<sup>5</sup> Cf. Recital 2 of the Brussels I Regulation: “*Certain differences between national rules governing jurisdiction [...] hamper the sound operation of the internal market. [...]*”

<sup>6</sup> [1972] Official Journal (OJ) L 299, 32.

<sup>7</sup> I.e. Germany, Belgium, France, Italy, Luxembourg and The Netherlands.

<sup>8</sup> From 1 May 2004 it has also applied in the ten states which joined the European Community under the Treaty of Athens, cf. Athens Act of Accession, art. 2 and Annex II, Part 19 (A) (3).

<sup>9</sup> [2001] OJ L 12, 1.

<sup>10</sup> Since Denmark does not participate in Title IV of the EC Treaty in general and, as a consequence, legal instruments adopted in the field of judicial cooperation in civil matters were not binding upon or applicable in this state. This situation was regarded as highly unsatisfactory and a convenient solution was found by means of public international law: The EU concluded a separate Convention with Denmark implementing the Brussels I Regulation as an international treaty, see [2005] OJ L 299, 62; [2005] OJ L 300, 55.

<sup>11</sup> ECJ 14 October 1976, 29-76 *LTU v Eurocontrol* [1976] ECR 1541.

<sup>12</sup> ECJ 14 October 1976, 29-76 *LTU v Eurocontrol* [1976] ECR 1541; 16 December 1980, 814/79 *Netherlands v Ruffer* [1980] ECR 3807; 22 April 1993, C-172/91 *Sonntag v Waidmann* [1993] ECR I-1963; 1 Oktober 2002, C-167/00 *VKI v Henkel* [2002] ECR I-8111; 15 May 2003, C-266/01 *TLARD v Staat der Nederlanden* [2003] ECR I-4867.

The basic rule of the Brussels Regulation concerning direct jurisdiction is enshrined in art. 2 of the Brussels I Regulation providing that “*persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that state*”.<sup>13</sup> In order to ascertain whether the defendant is domiciled in a Member State under this article, art. 59 of the Regulation, dealing with the question of which country’s definition of domicile is to be used, stipulates the own definition of the court of the EC Member State seised in order to determine whether a person is domiciled in that state (*lex fori*). Only when the courts wants to reject the defendant’s domicile at the forum is it obliged to apply the definition of the state in which it assumes the defendant’s domicile might be (*lex causae*).<sup>14</sup>

## B. Special jurisdiction

An exaggerated preference for the defendant’s domicile does not always provide the most appropriate, optimal solution in all situations, actions and claims. Accordingly, the Regulation provides for particular alternative jurisdictions if the defendant is to be sued in the courts of a state other than that of his domicile. In such cases, the choice of court is given to the plaintiff and it is not open to any of the courts involved to override the plaintiff’s choice on any grounds.<sup>15</sup> As the European legislator has frequently emphasized, this freedom of choice was introduced in view of the existence in certain well-defined cases of a particularly close relationship between a dispute and the court which may be most conveniently called upon to adjudge the disputed matter.<sup>16</sup> One exception, however, is of interest with respect to the subject of aggregation and divisibility of damage: art. 5 (3) of the Regulation, stipulating that in matters relating to tort, delict or quasi-delict, a person domiciled in a Member State may be sued in another Member State “*in the courts of the place where the harmful event occurred*”.

<sup>13</sup> The rationale behind this long-standing rule in favour of the defendant’s domicile was analysed excellently by the ECJ in 17 June 1992, C-26/91 *Handte v TMCS* [1992] ECR I-3967 noting that the rule reflects the purpose of strengthening the legal protection of persons established within a particular current “national” jurisdiction, and rests on an assumption that a defendant can normally most easily conduct his defence in the courts of his domicile. See also ECJ 28 September 1999, C-440/97 *Groupe Concorde v “Suhadiwarno Panjan”* [1999] ECR I-6307. Furthermore, the defendant presumably keeps most of his assets at his domicile and hence enforcement against his person or property can most easily be effected there. Thus, the rule tends to concentrate both adjudication of the merits and enforcement of the judgment in the same country, thereby avoiding unnecessary procedural complications.

<sup>14</sup> E.g. if the Austrian courts, having decided on the basis of their own definition that a person is not domiciled in Austria, want to know whether the defendant is domiciled in Poland they must apply the Polish definition of domicile. For legal entities see art. 60 Brussels I Regulation.

<sup>15</sup> Notably, the regulation does not provide any escape clause rule, which would allow the court, seised to refer to any more close relationship, e.g. a common habitual residence.

<sup>16</sup> Cf. Recital 11 of the Brussels I Regulation stipulating that “*The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a differing linking factor [...]*”

- 11 To begin with, the court has already decided upon facts which correspond to some extent to SCENARIO 1 above involving a horticultural company in the Netherlands, mainly depending on the waters of the Rhine for irrigating its plants, which suffered from the pollution of the river's water by the discharge of saline waste from a potash mine established in France.<sup>17</sup> Up to this decision concerning the wording of art. 5 (3) Brussels I Regulation it was particularly unclear whether the courts of the country where the *wrongful act took place* (i.e. France) or the courts where the *resulting infringement of the protected right arose* (i.e. The Netherlands) had jurisdiction over the matter.<sup>18</sup> The ECJ held that the text must be understood as covering *both* the place where the infringement – *and not only the damage* – occurred<sup>19</sup> and the place where the event giving rise to it took place and, as a rationale, referred to the respective equal proximity of both courts to the wrongful conduct or the infringement sustained – with the result being that the defendant must be sued, at the choice of the plaintiff, either in the courts at the place where the infringement occurred or in the courts at the place where the event giving rise to it occurred. It must be noted that these two options are not exclusive and do not deprive the plaintiff of his right to sue in the country of the defendant's domicile pursuant to the general provision.<sup>20</sup>
- 12 These places may, and quite frequently will, coincide, but nevertheless, this rule poses problems in cases concerning an international divisibility of damage, i.e. multi-state torts such as, for example, invasions of personality rights (SCENARIO 1). How this affects jurisdictional issues was demonstrated by a case of a libel action brought by an English woman against the publisher of a French newspaper of which 0.1% was distributed in the United Kingdom.<sup>21</sup> Evidently,

<sup>17</sup> ECJ 30 November 1976, 21-76 *Handelskwekerij G.J. Bier BV v Mines de potasse d'Alsace SA* [1976] ECR 1735; see *J. Schacherreiter*, Leading Decisions (2008) no. 261.

<sup>18</sup> The prevalent opinion understood the art. 5 (3) Brussels I Convention as an alternative to the general rule resulting only in a jurisdiction at the actual place of conduct (i.e. in this example France), see *G.A.L. Droz*, Compétence et exécution des jugements en Europe [2002] no. 76; *M. Weser*, Convention communautaire sur la compétence judiciaire et l'exécution des décisions [1975] no. 225bis; *E. Mezger*, Drei Jahre EG-Zuständigkeits- und Vollstreckungsübereinkommen in Frankreich, *Recht der Internationalen Wirtschaft* (RIW) 1976, 345, 347.

<sup>19</sup> Cf. this now also holds true for France, see *S. Galand-Carval*, Aggregation and Divisibility of Damage in France: Tort Law and Insurance, (contained in this volume) no. 47 ff. referring to Cass. Civ. 11 January 1984, Bull. Civ. no. 360; See also Cour de cassation, 11 May 1999, *Journal du Droit International* (J.D.I.) 126 (1999) 1048.

This seems to constitute a major change in the French judiciary: See with a referral to the "*lieu de préjudice*": Cour de cassation, *Urteil vom 25. Mai 1948*, *Revue critique de Droit International Privé* (Rec. crit. DIP) 39 (1949) 89; Cour d'appel Paris, 18 October 1955, *Rev. crit. DIP* 45 (1956) 484 ff.; or "*loi du lieu où le dommage a été réalisé*": Cour de cassation, 8 February 1983, J.D.I. 111 (1984) 123, 125; finally "[...] *que la loi applicable à la responsabilité extracontractuelle est celle de l'Etat du lieu où le fait dommageable s'est produit; que ce lieu s'entend aussi bien celui du fait générateur du dommage que du lieu de réalisation de ce dernier*". Cour de cassation, 14 January 1997, *Rev. crit. DIP* 86 (1997) 504, 505.

<sup>20</sup> *Infra* no. 9.

<sup>21</sup> ECJ 7 March 1995, C-68/93 *Fiona Shevill v Presse Alliance SA* [1995] ECR I-415. The defamatory statements related to alleged money-laundering for drug-traffickers by a bureau de change in Paris in which the plaintiff was temporarily employed.

vesting jurisdiction in both the courts of the state where the harm occurred and at the place of wrongful conduct is highly problematic: To begin with, it was unclear whether a particular court is at the place where the harm occurred or where the wrongful conduct took place. Furthermore, at first glance the solution might amount to a situation where the victim could basically obtain the right to combine several courts of jurisdiction, e.g. suing the publisher in England and France respectively, and each time in respect of the full damage.

The ECJ became aware of this preposterous invitation to *forum shopping* and tried to correct the consequences by introducing certain limitations on the choice of the plaintiff: Firstly, the court draws a distinction between the initial injury and consequential losses, and it refuses to permit a plaintiff to sue in the courts of any place where he has merely suffered pure economic loss consequential on an initial infringement of his protected right sustained elsewhere. Hence, only the primary infringement of the protected right is relevant for the assessment of the competent court under art. 5 (3) Brussels I Convention.<sup>22</sup> This rule extends to secondary victims who may only sue in the jurisdiction where the primary victim was harmed. Finally, in the libel case above, the court held that the publisher could be sued in the place of the wrongful conduct, i.e. at *his establishment* for *all the harm* caused by the defamation, or before the courts of *each country* where the publication was distributed and caused damage. However, in the latter case, the courts of each country have *jurisdiction solely in respect of the damage caused within their own territory*.<sup>23</sup>

It should not automatically be assumed that the limitations proposed by the European Court entirely solve the problems of divisibility of damage as regards international jurisdiction. In cases of infringement of personality rights, for example, the rule that neither indirect damage suffered elsewhere than in the original place nor damage suffered by secondary victims vests jurisdiction in national courts, leads to a situation where a plaintiff claiming compensation for his mental affliction suffered in England and brought about by a defamatory publication concerning his son which was distributed only in France may only

<sup>22</sup> Cf. ECJ 11 January 1990, C-220/88 *Dumez v Hessische Landesbank* [1990] ECR I-49; 19 September 1995, C-364/93 *Marinari v Lloyds Bank* [1995] ECR I-2719; 27 October 1998, C-51/97, for both decisions *J. Schacherreiter*, Leading Decisions (2008) no. 262 and 263.

<sup>23</sup> This solution basically descended from a French approach to the specific problem. However the "original" French solution basically reduced the application to the *lex fori* by introducing a certain causal connection and an application of the place where the harm (and not the original infringement of the legal interest, *sic!*) occurred (*supra* fn. 19): "*Attendu, en revanche, que les dommages provoqués par l'édition et la diffusion, en Allemagne, des publications litigieuses n'ont aucun lien de causalité avec ceux résultant de la diffusion de ce dernières en France; que, dans ces conditions, ces dommages ne se rattachent à ce tribunal ni par lieu de réalisation, ni par celui des actes fautifs; que ce tribunal est en conséquence incompétent pour connaître de l'action en réparation du préjudice subi par la demanderesse en Allemagne [...]*" TGI Paris, 27 April 1983, Rev. crit. DIP 72 (1983) 672, 674. Hence, a fundamental difference to the scheme of *Shevill* arises, cf. *J.-M. Bischoff*, annotation to Cass. Civ., 14 January 1997, Rev. crit. DIP 86 (1997) 505, 513.



sue the publisher in France, but not in England. Correspondingly, the test on whether a distant harm is adequately consequential on an initial injury to give jurisdiction to a local court may render rather poor results, e.g. if a Parisian lawyer wants to sue in France arguing that defamatory statements, although spread by the defendant in England only, have caused him financial damage in France by losing him English clients. Finally, the limitation on recognition and jurisdiction according to the national borders of the state where the harm occurred constitutes a return of the court to the *actor sequitur forum rei* rule, admittedly with a certain shift towards the courts where the harm occurred. Despite the fact that this accentuation of the latter court(s) proves appropriate since these courts have the closest connection to the alleged victims of the damage, victims who have suffered considerable damage in several countries are well advised to consult legal experts in order to select the Member State or a combination of Member States where their prospects of successful litigation are best.<sup>24</sup>

- 15 The above considerations so far only reflect SCENARIO 1 and possible plurality of losses in different places. Vice versa a situation where multiple tortfeasors act as principal and servant might become relevant for this provision (SCENARIO 2), i.e. whether the plaintiff can hold the principal liable at the place where only the servant acted. One should bear in mind that virtually all European jurisdictions and accordingly the *Principles of European Tort Law* (PETL) hold the principal liable when he “acts” via an instructed and (socially) dependent accomplice.<sup>25</sup> Hence, it seems reasonable to extend the jurisdiction to that principal even when he himself or his accomplice are not domiciled at the place where the harmful event giving rise to the damage occurred, since ultimately the person enlarging his sphere of action via assistants should bear the risk of court proceedings in the country where said assistants acted.<sup>26</sup>

### C. Ancillary jurisdiction and concurrent proceedings (*lis pendens*)

- 16 Whereas the special jurisdiction under art. 5 (3) Brussels I Regulation fits SCENARIO 2 only in special circumstances, art. 6 of the Regulation provides for a much broader scope of aggregation of different claims against multiple tort-

<sup>24</sup> M. Bogdan, Private International Law Aspects of Trans-Border Invasion of Personality Rights by the Media, in: A. Beater/S. Habermeier, Verletzungen von Persönlichkeitsrechten durch die Medien (2005) 138, 142; see also C. von Bar, Persönlichkeitsschutz im gegenwärtigen und zukünftigen deutschen internationalen Privatrecht, in: Law in East and West/Recht in Ost und West, Festschrift zum 30jährigen Jubiläum des Institutes für Rechtsvergleichung der Waseda Universität (1988) 575 ff.; W. Nixdorf, Presse ohne Grenzen: Probleme grenzüberschreitender Veröffentlichungen, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 1996, 842, 844; H. Schack, Grenzüberschreitende Verletzung allgemeiner und Urheberpersönlichkeitsrechte, Archiv für Urheber-, Film-, Funk- und Theaterrecht (UFITA) 108 (1988) 51, 66; P. Mankowski, Art. 5 in: U. Magnus/P. Mankowski, Brussels I Regulation (2007) no. 207 ff.

<sup>25</sup> See, art. 6:102 (1) PETL.

<sup>26</sup> See E. Rabel, Conflict of Laws, vol. II (1960) 318: “Hence, the theory advocating the law of the place of acting is entirely antiquated if it stresses physical movements. Not the locality where a person operates, but that to which his operations are directed, is material.”

feasors. According to this provision, the Brussels I Regulation recognizes the desirability, in the interest of the sound administration of justice and of reducing the risk of conflicting judgments, that related disputes be decided together in a single proceeding and allow for the joining before a single court of closely connected claims over which several different courts would ordinarily be competent under the Regulation. Hence, art. 6 Brussels I Regulation provides ancillary jurisdiction over co-defendants, even if the court seised would not have had jurisdiction to entertain the additional claim in its own right, i.e. under art. 2 or 5 (3) Brussels I Regulation.<sup>27</sup> Basically, the provision holds that a “*person domiciled in a contracting state may also be sued [...] where he is one of a number of defendants in the courts for the place where any one of them is domiciled.*”<sup>28</sup>

Apparently, this exception to the general rule of art. 2 Brussels I Regulation – presumably stipulating a jurisdiction other than that of the defendant’s domicile – substantially aggravates the danger of misuse by resulting in proceedings being brought against a number of defendants with the sole object of ousting the jurisdiction of the particular courts where one of the defendants is domiciled. Accordingly, two general conditions of its application must be met. To begin with, jurisdiction over a connected claim against a defendant domiciled in another Member State belongs exclusively to the courts of the domicile of one of the other defendants.<sup>29</sup> Furthermore, the European Court of Justice<sup>30</sup> held that, to justify that claims against various defendants domiciled in different Member States be heard and determined by one single court, there must be a *connection* between the various actions brought by the same claimant against the different defendants of such kind that it is expedient to hear them together in order to avoid irreconcilable judgments.<sup>31</sup> When this particular condition is met, does not depend on whether the loss caused is indivisible or not.<sup>32</sup> The Court clearly referred on several occasions only to the risk of judgments if decided separately rendering contradictory results, even if those judgments were mutually

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<sup>27</sup> Moreover, this principle is given negative effect by art. 27–30 preventing concurrent actions in different Member States in similar or related issues.

<sup>28</sup> Consistently, the Regulation extends to a counterclaim, so as to enable a defendant who counterclaims against a local plaintiff to join a foreign co-defendant to the counterclaim and similarly to a claim by a third party (joined by a defendant) against local or foreign plaintiffs.

<sup>29</sup> In particular, there is no requirement that one certain claim must be more essential to harm ultimately caused and the court at the “the spider at the centre of the web” is exclusively empowered to hear the multiple connected claims, however small the claimed contributory part by the others defendants might have been. Cf. *H. Muir Watt*, Art. 6, in: U. Magnus/P. Mankowski, Brussels I Regulation (2007) no. 23, 25.

<sup>30</sup> ECJ 27 September 1988, 189/87 *Kalfelis v Schröder* [1988] ECR 5565; 27 October 1998, C-51/97 *Réunion Européenne v Spliethoff’s Bevrachtungskantoor* [1998] ECR I-6511.

<sup>31</sup> ECJ 27 September 1988, 189/87 *Kalfelis v Schröder* [1988] ECR 5565; 27 October 1998, C-51/97 *Réunion Européenne v Spliethoff’s Bevrachtungskantoor* [1998] ECR I-6511.

<sup>32</sup> In particular, it rejected the French notion of indivisibility as a requirement of ancillary jurisdiction – which was proposed in order to secure that possible other courts are not ousted – had no place within the scheme of the Convention. See ECJ 24 June 1981, 150/80 *Elefantenschuh v Pierre Jacqmain* [1981] ECR 1671.

exclusive and could even be executed separately.<sup>33</sup> Any further remarks on the quality of the connection necessary, however, could not be gathered since the European Court stated explicitly that it was “*for the national courts in each individual case whether that condition is satisfied*”<sup>34</sup> thus basically referring the questions back to the national courts and giving them significantly more leeway when assessing possible jurisdiction over multiple defendants.

- 18 Quite similar to the problem explained above is the question of when proceedings simultaneously *pending* in courts of different Member States could effectuate jurisdiction in respect of disputes, which are factually and legally the same.<sup>35</sup> Concerning two related cases, art. 28 Brussels I Convention basically confers upon the courts of the respective Member State discretion to stay their proceeding in favour of the first court seised, in order to constrain irreconcilable judgments. As far as identical cases, i.e. identical claimants and identical facts are concerned, art. 27 Brussels I Regulation provides a clear and effective mechanism for resolving cases of *lis pendens* and related actions by primarily establishing a test based on chronological priority,<sup>36</sup> according to which a court subsequently seised is required to decline jurisdiction in favour of the first court seised, instead of performing a judicial evaluation of the relative appropriateness of the two fora.

### III. Applicable Law

#### A. Introduction

- 19 It is worth reiterating the basic concepts from the start: When only the rules on international jurisdiction are applied, the court seised applies its substantive national law, i.e. its *lex fori* and the result of the case depends on where it is brought to a national court. Such state of law has long been considered unsatisfactory and in particular during the past century several earnest but unsuccessful attempts at the elaboration of a unified legal act on the law applicable to non-contractual obligations on a European level have been undertaken.<sup>37</sup>

<sup>33</sup> A differentiation concerning the basis of claim (see, ECJ 27 September 1988, 189/87 *Kalfelis/Schröder* [1988] ECR 5565; 27 October 1998, C-51/97 *Réunion Européenne v Spliethoff's Bevrachtingskantoor* [1998] ECR I-6511), however, was proposed by the court, but, as recently as 2007 given up. See, ECJ 11 October 2007, C-98/06 *Freeport plc v Olle Arnoldsson* [2007] ECR I-8319.

<sup>34</sup> Supra fn. 31.

<sup>35</sup> However, especially art. 28 Brussels I Regulation differs in structure as well as function: Whereas art. 6 Brussels I regulation addresses the court originally seised of a claim and allows to extend its jurisdiction, art. 28 provides for related actions, which are each *already pending* before the courts of different Member States. The main difference, however, lies within the original competence of the courts seised: art. 28 Brussels I Regulation allows to join proceedings pending before originally *competent* courts – whereas art. 6 vests jurisdiction in an otherwise incompetent court by virtue of the close connection described above, see no. 17.

<sup>36</sup> *Prior tempore potior iure*.

<sup>37</sup> The Hague Conference on Private International Law adopted, inter alia, two conventions in the field of tort law concerning cases of *traffic accidents* and *product liability* in 1973 and 1971 respectively. See <<http://www.hcch.net>>. Given the restrictions to single issues by the Hague

Finally, in 2003 the European Commission officially addressed the issue, presenting a new proposal, which was critically discussed and re-drafted several times. Finally, a revised<sup>38</sup> version resulted in the enactment of Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation).<sup>39</sup> It entered into force on 11 January 2009 for all cases where the damage event occurs thereafter.<sup>40</sup>

The Rome II Regulation covers all non-contractual obligations in “civil and commercial matters” having multistate contacts of the kind and pertinence that implicate the laws of more than one state. This scope of the Regulation is, however, restricted by a list of specific exclusions and the application of its general rule in art. 4 (1) is further limited by a number of special rules covering product liability, unfair competition, environmental damage, infringements of intellectual property rights and industrial action. Furthermore, violations of privacy and rights relating to personality are so far excluded, waiting for a respective study and further clarification pursuant to the review clause of art. 30. This research extends to a study on the effects of art. 28 with respect to the Hague Convention of 4 May 1971 on the law applicable to traffic accidents;<sup>41</sup> so far the Regulation is highly unsatisfactory because art. 28 provides that the Regulation regime “shall not prejudice the application of international conventions to which one or more member states are parties at the time when this Regulation is adopted and which lay down conflict of law rules relating to non-contractual obligations”.

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Conference, the European Union attempted a more comprehensive agenda and presented a draft convention on the harmonization of the conflict rules in contractual as well as non-contractual obligations also in the early 1970s. See, *RabelsZ* 38 (1974) 211. With the expansion of the European Community, this ambition ultimately abated and the decision was made to abandon the tort provisions of the draft convention and instead concentrate on conflict rules for contract conflicts resulting in the Rome Convention on the Law Applicable to Contractual Obligations 1980.

The idea of a harmonization of the rules concerning non-contractual obligations was revived in the late 1990s, when the European Community acquired in the course of the so-called “Vienna Action Plan” legislative competence in the field of conflict of laws under art. 61 and 65 Treaty of Amsterdam of 2 October 1997.

<sup>38</sup> Already in 2001 there was an unpublished version of the green book (cf. *J. von Hein*, *ZVglR-Wiss* 2003, 528, 533), followed by a preliminary draft in May 2002. After consultation, an amended proposal was adopted in July 2003 (COM 2003 427 final). Due to the needs of the then newly established conciliation procedure under art. 251 EC Treaty, the European Parliament’s Committee on Legal Affairs presented several reports by *Diana Wallis* on the topic – differing substantially from the Commission proposals – and this was comprehensively commented on. After long and difficult negotiations, compromises on the most controversial issues were reached while others were suspended to a future revision of the Regulation. For an initial overview cf. *B.A. Koch*, *European Union*, in: *H. Koziol/B.C. Steininger* (eds.), *European Tort Law* 2003 (2004) 435 no. 1 ff.; *id.* in: *European Tort Law* 2005 (2006) 593 no. 10 ff.; *id.* in: *European Tort Law* 2006 (2008) 487, no. 3 ff.

<sup>39</sup> OJ L 199, 31.7.2007, 40–49.

<sup>40</sup> Presumably, a drafting error in art. 32, 31 Rome II may suggest an earlier date of application, cf. *Koch*, *European Tort Law* 2006 (fn. 38) fn. 3.

<sup>41</sup> *Supra* fn. 37.

- 21 In the light of the Hague Convention on Traffic Accidents – which provides extraordinarily complex and rather outdated rules on traffic accidents ultimately leading to a rejection of this Convention by the better part of the European Member States – different legal regimes now govern that area in which the most practical and especially numerous conflict cases arise, i.e. international car accidents. This inevitably results in cases of *forum shopping* facilitated ironically by a community instrument originally aimed at preventing suchlike iniquitous behaviour.<sup>42</sup>

#### B. General rule and (prevailing) special rules

- 22 The thus limited general rule of the Regulation stipulates the *lex loci delicti*, (mis-) understood however, by the Rome II drafters as the law of the place of the injury or of the infringement of the protected interest (*lex loci damni*). According to the Regulation, the applicable law shall be the law of the country in which the harm *occurs*,

“irrespective of the country in which the event giving rise to the damage occurred” (art. 4 (1) Rome II Regulation) and “regardless of the country or countries in which the indirect consequences could occur. Accordingly in countries of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.”<sup>43</sup>

- 23 The European legislator held that such “*principle of the lex loci delicti commissi is the basic solution for non-contractual obligations in virtually all the member states*” though it admitted that the “*practical application of this principle [...] varies*”.<sup>44</sup> And, indeed, the *lex loci delicti* is the basic rule in all Member States. Nonetheless, the allegation by the European legislator that the *lex damni* is used as the compelling connecting factor must be called into question given that some countries opt for the place of conduct in general,<sup>45</sup> others

<sup>42</sup> For a more detailed analysis of the problem, see T. Thiede/M. Kellner, “Forum Shopping” zwischen dem Haager Übereinkommen über das auf Verkehrsunfälle anzuwendende Recht und der Rom-II-Verordnung, Versicherungsrecht (VersR) 2007, 1624.

<sup>43</sup> See Recital 17 of the Regulation. For a further elaboration of this principle of *lex loci damni* an example (slightly transformed from the Case Study in the original Questionnaire) may illustrate the inherent problem: In a car park in State A, just before crossing the border with State B, D decides to poison P. Unbeknown to P, D puts a noxious chemical into P’s water bottle, which is in P’s luggage for his trip to State C via State B. While in State B, P gives some of the contaminated water to his dog, which he has taken with him on his journey. Shortly after, the dog starts to vomit, making a mess of P’s car. After arriving in State C, P himself takes a sip from the water and consequently falls sick, suffering from stomach cramps. Moreover, whilst still in State C, P has to pay € 150 to the vet for examining his dog. As far as the compensation for the cleaning of the car is concerned, the law of State B would be applied since the dog’s poisoning resulted there in the damage to P’s car. Accordingly, P’s pain and suffering would be determined according to the laws of State C since his condition was sustained there. Only the costs of the vet are a consequential loss and would, hence, be determined according to the laws of State B.

<sup>44</sup> See Recital 15 of the Regulation.

<sup>45</sup> Austrian PIL Act of June 15, 1978 § 48(1); Polish PIL Act 1965 art. 33(1).

opt for the place of injury,<sup>46</sup> others apply the law of the place of conduct in some specified cases and the law of injury in other cases,<sup>47</sup> still others leave the question unanswered,<sup>48</sup> and, finally, some Member States allow the victim or the court to choose between the laws.<sup>49</sup> Hence, it would have been far more auspicious if the Rome II codifiers had realised that the current national codes contain at least important allusions to the *lex loci delicti commissi* and not merely variations of the application of a general principle of *lex damni*. As already explained above, the scope of art. 4 Rome II Regulation is additionally somewhat limited by specific exclusions set out in the Regulation. Surprisingly, it must be noted that questions concerning the predominantly important fact patterns were deemed too major and too special a category to leave to the *lex damni* rule, with the result that the legislator referred them to the – otherwise obviously disregarded – *lex loci delicti commissi*.

This, however, amounts to a situation where the legislator alleges to have found a consensus on a general rule but then subjects such in (almost) all relevant cases to an otherwise concealed rejected rule. In the light of this *lex specialis* approach by the drafters and the existing and accessible national codes and case law explained above, comparative research of the basic principles governing tort law in general and, accordingly, conflict of laws in the area of tort, would have been far more propitious than this game of hide and seek – and might have revealed a general principle governing this field of conflict rules. 24

Basically, it is understood in all European Member States, and, accordingly, in the *Principles of European Tort Law* (PETL), that the main purpose of tort law is the *restitutio ad integrum* – the (full) compensation of damage.<sup>50</sup> This basic principle is, however, limited to the extent that this damage is attributable to the tortfeasor – a rule wisely enshrined in the old rule of *casum sentit dominus*. In addition, it is generally agreed that tort law has an additional aim of *prevention*, since having to compensate basically has a deterrent effect.<sup>51</sup> Accordingly, these general objectives pursued by substantive tort law can be translated into terms of conflict of laws.<sup>52</sup> The general idea of compensation and a general focus on the indemnification of the victim *prima facie* suggests the application of the *lex damni*: The victim's legitimate expectations focus on the protection provided by the law of the country where he participates in public intercourse and, thereby, exposes his rights and interests to potential infringements.<sup>53</sup> The victim of a wrongful act is typically not a qualified law- 25

<sup>46</sup> Dutch PIL Act, art. 3(2); English PIL Act 1995 § 11.

<sup>47</sup> See Portuguese Civ. Code, art. 45 (1), (2); Swiss PIL Act, art. 133(2).

<sup>48</sup> Spanish Civ. Code art. 9; Greek Civ. Code, art. 26; Czechoslovakian PIL Act of 1963, art. 15.

<sup>49</sup> EGBGB, art. 40(1); Hungarian PIL Decree of 1979 § 32 (1)(2); Italian PIL Act of May 31, 1995, art. 62(1).

<sup>50</sup> See, art. 1:101 PETL.

<sup>51</sup> U. Magnus, Comparative Report, in: U. Magnus (ed.), *Unification of Tort Law: Damages* (2001) 187; F. Bydlinski, *System und Prinzipien* (1996) 190 ff.; M. Faure, *Economic Analysis*, in: B.A. Koch/H. Koziol (eds.), *Unification of Tort Law: Strict Liability* (2002) 364 ff.

<sup>52</sup> Cf. *infra* no. 4.

<sup>53</sup> G. Wagner, *IPRax* 2006, 372 (374).

yer; nevertheless, one may assume that he has confidence in the standards of compensation at the place where the harm occurred, very often the place of his habitual residence. Moreover, the development of systems not primarily based on some concept of reproach for misbehaviour and which instead shift the focus to at least additional or even entirely different aspects such as objective danger (“*strict liability*”)<sup>54</sup> may support the application of the *lex damni*.<sup>55</sup> Accordingly, some authors<sup>56</sup> assume that in modern tort law and in the context of conflict of laws, a focus on the loss sustained and, thus, the application of the *lex damni*, is required by liability for exposure to loss and the fact that in some instances of liability there is, moreover, hardly any prerequisite other than causation of the damage sustained (strict liability). Finally, an application of the law at the place where the harm occurred is considered simpler in SCENARIO 2 above: If multiple wrongful acts in different jurisdictions are the *conditio sine qua non* for one detrimental result, the application of the *lex damni* seems to be the simple and straightforward solution for the judge.

- 26 All these arguments may be valid in themselves, but they focus only on the victim’s interests. Such general concerns for the victim are excessive and to this extent somewhat misplaced. An appropriate solution must focus on the interests of all parties involved, including those of the tortfeasor. As already stated, substantive law dictates that a person has to compensate for another person’s injury only if certain requirements of liability are met: A person is only under obligation to render compensation if the damage is legally attributable to him – *casum sentit dominus*.<sup>57</sup> Accordingly, for questions of conflict of laws, it is necessary to determine which law should provide the criteria for this attribution. In cases of liability based on fault, the law of the state where the conduct in question took place governs these criteria since everybody has to comply with the rules and standards of that country in which he acts (assuming that this is the place of his habitual residence). To the same extent, the confidence of the victim in the relevant standards of the state where the harm occurred has to be considered whereas simultaneously the expectations of the tortfeasor according to the standards of the state where he commits the tortious action must be taken into account. To begin with, an attributable, negligent behaviour by the wrongdoer requires in any case that he was able to recognise the legal standards with which he had to comply beforehand. These considerations argue for the place of conduct, the *lex loci delicti commissi*.<sup>58</sup>

<sup>54</sup> B.A. Koch/H. Koziol, Comparative Conclusions, in: B.A. Koch/H. Koziol (eds.), *Unification of Tort Law: Strict Liability* (2002) 395 ff.

<sup>55</sup> See on this topic only H. Stoll, Zweispurige Anknüpfung von Verschuldens- und Gefährdungshaftung im internationalen Deliktsrecht? in: *Festschrift Ferid* (1978) 397.

<sup>56</sup> T. Kadner Graziano, *Gemeineuropäisches Internationales Privatrecht* (2002) 218.

<sup>57</sup> Accordingly, there is no “level playing field” as suggested by G. Wagner, *Internationales Deliktsrecht, die Arbeiten an der Rom II-Verordnung und der europäische Deliktsgerichtsstand, Praxis des Internationalen Privat- und Verfahrensrechts* (IPRax) 2006, 372 (376); T. Kadner-Graziano, Das auf außervertragliche Schuldverhältnisse anzuwendende Recht nach Inkrafttreten der Rom II-Verordnung, *RabelsZ* 73 (2009) 1 (36).

<sup>58</sup> Moreover, the deterrent effect of tort law also supports the application of the law of the place of conduct, since the threat of future liability can only induce prudent behaviour if the potential

In this stalemate situation between the two possible connecting factors, the argument of the simplicity of application of *lex loci damni* remains. When this line of reasoning is applied to the test of aggregation or divisibility of damage, the results rendered may no longer seem acceptable in SCENARIO 1: Especially in cases concerning intellectual property and personality rights,<sup>59</sup> the *lex damni* rule may actually result in exorbitant difficulties since damage may occur in more than one geographical location and, thus, a multitude of laws may be rendered applicable. This results in a difficult mosaic assessment (*Mosaikbeurteilung*) of one single claim, i.e. the separation of the overall harm into several independent torts, which then should be subsumed by one single court.<sup>60</sup>

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Indeed, in cases of multiple tortfeasors' conduct resulting in only one injury as in SCENARIO 2, the current rule may provide acceptable results at first glance. However, when the scenario is varied to a situation where the conduct results in multiple damage events in *different* countries, due to the mosaic assessment of the respective losses, the internal recourse of the respective tortfeasors would be entirely corrupted: If multiple tortfeasors are liable under several laws, their internal redress may be determined differently by the laws applied, e.g. in cases where one law applied has specific provisions which exclude a recourse action against the other wrongdoers.<sup>61</sup> Since according to art. 20 Rome II Regulation the internal recourse of the tortfeasors is governed by the law applicable to the respective original claim, the problem of the mosaic assessment would be exponentially aggravated and a coherent recourse action between the tortfeasors would not be possible. Hence, the argument of simplicity must also be rejected.

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The foregoing general remarks are not intended as a general argument for a general application of the law at the tortfeasor's place of wrongful conduct, but instead to take account of the fact that tort law in general does not focus solely

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tortfeasor is aware of the applicable standards of conduct; this is most likely in respect of the standards at the place of conduct. Furthermore, the proposition that modern tort law and particularly strict liability demands a focus on the loss sustained must be rejected: Liability based on fault is still the core of tort law (See, *P. Widmer*, Bases of liability, in: European Group on Tort Law, Principles of European Tort Law (2005) 68; *C. v. Bar*, The Common European Law of Torts, vol. I (1998) no. 11.) and, in addition, strict liability is not liability for any loss sustained – strict liability regularly covers situations of extraordinary danger requiring a correspondingly extraordinary allocation of responsibility and is applied in cases where a highly significant risk of harm remains despite all proper precautions taken by the defendant. (See, *B.A. Koch*, Strict Liability, in: European Group on Tort Law, Principles of European Tort Law (2005) 105.) Nonetheless, there is no clear-cut concept of strict liability, not even within any single jurisdiction. Hence, every proprietor of an exceptional source of danger will assume that the law of the place where this danger is actually situated will be applied to the basis, scope and the design of the respective liability and calculate the risk accordingly.

<sup>59</sup> Which are excluded under the Rome II Regulation, *infra* no. 20.

<sup>60</sup> Promoting this solution: *P. Mankowski*, Art. 5, in: U. Magnus/P. Mankowski, Brussels I Regulation (2007) no. 212.

<sup>61</sup> See, *H. Stoll*, Rechtskollisionen bei Schuldnermehrheiten, in: Festschrift Müller-Freienfels (1986) 665; *W.V.H. Rogers*, Comparative Report on Multiple Tortfeasors, in: W.V.H. Rogers, Unification of Tort Law: Multiple Tortfeasors (2004) 292.



on the victim's issues but also on those of the tortfeasor and seeks to balance both sides. Therefore, it would have been advisable for the European legislator to consider the conflicting interests of *both parties* in the general rule so far as justifiable. Such a rule would not even have to be designed from scratch since practicable solutions already exist in some national codes and have been proposed by academics in the last century.<sup>62</sup> Last but not least, the arguments for the application of the *lex loci delicti commissi* do not demand exclusive consideration of this specific jurisdiction. An exception is justified in cases where the tortfeasor is aware of the cross-border nature of his action and where damage in another country is *foreseeable* to him;<sup>63</sup> in this case the application of the law of the state where the harm was incurred does not conflict with the legitimate expectations of the tortfeasor (and in case of multiple tortfeasors, their internal recourse) since he violated the conduct standards of that state. In other words, the key question in such cases should be whether, under the given circumstances, a reasonable person could have foreseen that his conduct in one state would produce injury in the other state. A general rule according to this basic principle would have rendered the numerous exceptions to the current rule unnecessary and would have balanced the legitimate interests of both parties.

- 30 It should not be forgotten that the drafters of Rome II proposed quite a similar idea in art. 17 of the Regulation providing that, regardless of which law governs the non-contractual obligation, "*account shall be taken [...] of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability*" (emphasis added) when determining the actor's liability. Nevertheless, this rule does not introduce a rule of choice of law but merely allows, on a discretionary basis and in an evidentiary sense, mere consideration of this factor. Despite the use of the imperative "*shall*", art. 17 does not require the court to apply the rules of conduct and safety of the place of conduct, but only to "take them into account". It is doubtful whether this provision actually solves the general problem outlined above and one sees that only two future possibilities for the application of *lex loci delicti commissi* to unforeseeable and, thus, non-attributable damage remains: Either the general rule of art. 4 is maintained without any relation to its purpose, thereby producing inconsistent (or rather unjustifiable) results, or the rule is generally left aside by way of analogy to art. 17. This future gadgetry should have been avoided, since the wording "take into account" ought to be taken seriously, simply because analo-

<sup>62</sup> See Swiss PIL Code art. 133 Abs. 2: "[...] Tritt der Erfolg nicht in dem Staat ein, in dem die unerlaubte Handlung begangen worden ist, so ist das Recht des Staates anzuwenden, in dem der Erfolg eintritt, wenn der Schädiger mit dem Eintritt des Erfolges in diesem Staat rechnen musste"; G. Beitzke, Auslandswettbewerb unter Inländern, Juristische Schulung (JuS) 1966, 140: "Wer ins Ausland hinüberwirkt, muss die Folgen dieses Handelns, also Rechtsgüterverletzung im Ausland, in Betracht ziehen und auch prüfen, ob er hier nicht einen unerlaubten Eingriff in eine Rechtssphäre begeht, einen am Erfolgsort ungerechtfertigten Erfolg herbeiführt."; acknowledging the result hile basically denying the arguments above T. Kadner-Graziano, *RabelsZ* 73 (209) 1 (36, Fn. 111).

<sup>63</sup> It would manifestly be absurd to assert that every case of cross-border damage is foreseeable. If that were the case, the above special rules (no. 22) for instance would not be necessary at all.

gies in conflict of laws enhance the tendencies of national courts to apply their *lex fori*, resulting in internationally counter-productive judgments as shown by the following, final chapter of this report.

### C. Personal injury

So far only divisibility from the perspective of procedural issues has been discussed. But, even apart from SCENARIOS 1 and 2 above, a specific problem arises due to the different levels of compensation awarded in different states. Here, a material category of damages, i.e. compensation for personal injury<sup>64</sup> leads to a conflict of laws phenomenon commonly referred to as *depeçage*: 31

SCENARIO 3: The Spanish motorist E runs over the Englishman G.B. in Spain. The latter is rescued at the last-minute by physicians. G.B. is left paraplegic, unable to work and will need constant medical treatment for the rest of his life.

Basically, the national courts would have to award damages according to the law applied; in this example Spanish law provides the statutory scale according to which damages have to be awarded under the general rule of art. 4 Rome II Regulation. However, due to the relatively low costs of substitute pleasures in Spain, the amount of compensation for personal suffering will be inadequate in the United Kingdom, i.e. the damages will not be sufficient and the basic principle of *restitutio in integrum* will not be observed. Moreover, the opposite example also produces unsatisfactory results, e.g. when an English motorist in the United Kingdom runs over a Latvian pedestrian. The Latvian would receive damages according to the English statutory scale for personal suffering and thereby would be awarded an amount of damages much higher than is necessary in Latvia having regard to the cost of substitute pleasures for the harm sustained there. 32

In general, two fundamentally different approaches to this dilemma are up for debate: Either cases of personal loss are consistently assessed by *one* law, e.g. the (foreseeable) place of injury or, alternatively, the otherwise uniform legal relationship is split up as a result of subjecting the prerequisites of liability and part of its consequences to different laws, e.g. to submit the compensation of personal injury to the law of the victim's place of habitual residence (*depeçage*). 33

Rather unsurprisingly due to the relatively high awards for personal injuries in quota and amount there, it has been most notably the English courts which have had to address this dilemma several times in recent years. Originally, the English "double actionability rule" required that the tort was actionable under the laws both of forum, i.e. *English* substantive law, and the jurisdiction where the tort was committed<sup>65</sup> – ultimately leading the English judge to an assess- 34

<sup>64</sup> For a more detailed analysis of the problem with further references, see T. Thiede/K. Ludwischowska, ZVglRWiss 106 (2007) 92 ff.

<sup>65</sup> Cf. *Chaplin v. Boys* [1971] Appeal Cases (A.C.) 356 (H.L. 1969)

ment of damages according to his *lex fori*, English substantial law. This rule was ultimately abolished in 1995 by the Private International Law Act 1995 (Miscellaneous Provision) creating a general presumption for application of the law of the state where the injury was incurred<sup>66</sup> unless it is “*substantially more appropriate*” to apply some other law.<sup>67</sup> This general revision of the law in this area did not, however, stop English courts from continuing to apply their *lex fori* for the measurement or quantification of damages. As recent as 2006 in *Harding v Wealands*<sup>68</sup>, the House of Lords labelled these questions as procedural, so that the law of the forum – English law – rather than a foreign law, is applicable to questions of measurement and quantification. And, indeed, according to the legislative history of the statute, Parliament originally intended that “[...] issues relating to the quantum or measure of damages are at present and will continue [...] to be governed by the law of the forum; in other words, by the law of [...] the United Kingdom. [The] courts will continue to apply our own rules on quantum of damages even in the context of a tort case where the court decides that the ‘applicable law’ should be some foreign system of law so far as concerns the merits of the claim.”<sup>69</sup>

- 35 Beyond doubt, the English approach to the personal injuries dilemma, i.e. classifying quantification of damages as procedural, is absurd since the quantification of damages is bottom-line and “*what all the huffing and puffing at trial is about*”.<sup>70</sup> Nevertheless, in the course of the legislative process of the current Rome II Regulation in the European Parliament, the English rapporteur proposed (and Parliament approved) quite a similar approach: The parliamentarians insisted on the insertion of an exception to the general rule in cases of personal injuries, to the effect that the court seised should apply “*for the purposes of determining the type of claim for damages and calculating the quantum of the claim [...] the individual victim’s place of habitual residence [...]*”.<sup>71</sup> The European Council as well as the Commission rejected this amendment and finally a compromise was found in the form of the insertion of Recital 33 of the Regulation providing that when “*quantifying damages for personal injuries in cases in which the [wrongful conduct] takes place in a State other than that of habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention.*” In addition, a Review Clause was implemented into the Regulation, demanding a study on the national differences in compensation levels not later than 2011.<sup>72</sup>

<sup>66</sup> Cf. Private International Law (Miscellaneous Provisions) Act 1995, § 11.

<sup>67</sup> Cf. Private International Law (Miscellaneous Provisions) Act 1995, § 12.

<sup>68</sup> *Harding v. Wealands* [2006] United Kingdom House of Lords (UKHL) 32, [2006] 3 Weekly Law Reports (W.L.R.) 83.

<sup>69</sup> *Harding v. Wealands* [2006] UKHL 32, [2006] 3 W.L.R. 83, para. 37.

<sup>70</sup> R.J. Weintraub, Choice of Law for Quantification of Damages: A Judgment of the House of Lords Makes a Bad Rule Worse, 42 Tex. Int’l L.J. 311 (313).

<sup>71</sup> Eur. Parl. Final (A6-0211/2005 of 27 June 2005).

<sup>72</sup> Art. 30 Rome II Regulation.

The English and European parliamentarians argued that their solution provides a viable solution for the victim – he will be compensated according to the standards at his habitual residence. As a consequence, differences in the amount of damages awarded in personal injury cases in Europe are adjusted to a very large extent. Moreover, the assignment of damages to the victim's place of habitual residence could support the general mobility of individuals in Europe since a victim would be entitled to compensation as if he was at home. Last but not least, Parliament argued that in connection with the direct or alternative jurisdiction of the Brussels II Regulation, the assessment of damages would ultimately be easier for the judge since the place of habitual residence will regularly coincide with the *lex fori*.<sup>73</sup>

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The general lack of research conducted by the European Parliament is best illustrated by the last argument: As explained earlier, the Brussels II Regulation grants international jurisdiction at more places than the *lex fori* of the victim, i.e. the place where the conduct took place, the place where the harm occurred and, generally, at the habitual residence of the defendant.<sup>74</sup> There may be coincidence of course – but not necessarily. Naturally, a court at the habitual residence of the victim is often most convenient for the latter – but, as already illustrated above, the convenience of the victim is not a general standard applied in conflict of laws. Hence, it is to be assumed that two different jurisdictions will be applicable to the case. With the potential divergence of the law of the habitual residence of the victim from the *lex fori*, a further disadvantage to this solution becomes obvious: The law applicable to the case will be doubled. For example, the law at the place where the harm occurred will be applied to the prerequisites of liability whereas another law, i.e. the law at the habitual residence of the victim, will be applied to evaluate the consequences of the wrongful conduct. Even if the *lex fori* and the law at the habitual residence of the victim coincide, a second law, i.e. the *lex damni*, will be applicable to the same case. Hence, the solution supplied by *depeçage* is not practical at all.

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This divergence is not limited to practical considerations but extends to a dogmatic unsustainability: A *depeçage* in a single case results in a legal situation formerly non-existent in both of the laws applied to the case and, hence, different from the legal situation in both jurisdictions. This dogmatic inconsistency provokes numerous shortcomings. Thus, even the alleged enhancement of the mobility of European citizens and sound administration of justice in particular cases must be seriously doubted since the application of two sets of liability regimes result e.g. in two different awards for damages in the same road traffic accident if the victims have their habitual residences in two different countries. Furthermore, it must be considered that the national legislators do not award damages arbitrarily but in connection with the prerequisites of the claim. Regularly, higher standards governing the prerequisites lead to gener-

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<sup>73</sup> Eur. Parl. Final (A6-0211/2005 of 27 June 2005).

<sup>74</sup> Cf. *infra* no. 10 ff.

ous indemnification of damages and *vice versa*. In cases with strict liability at the place where the harm occurred and a liability based on fault at the habitual residence of the victim, a detachment of basis and result of liability is not only impractical but also simply preposterous.

- 39 The *depeçage* solution to the personal injuries dilemma draws the protective cloak of his domestic jurisdiction around the victim, ignoring the legitimate expectations of the tortfeasor. Judges may find it obnoxious to have to explain to tortfeasors why the amount of damages ultimately awarded to the victim does not depend on the specific situation and the particular case but rather on the habitual residence of the latter: Why should liability depend on the question of whether the pedestrian knocked down is of domestic or foreign citizenship? It must be emphasized that the thin or “egg-shell skull” rule<sup>75</sup> does not apply here since this basic principle refers more to the physical constitution of the victim than his place of residence.
- 40 Furthermore, countries with a lower standard of indemnification or a *barème* system are not likely to embrace a *depeçage* solution. If a citizen of such a country commits a tort in which a national of a country with a high standard of indemnification is injured, e.g. a road traffic accident, the compulsory liability insurance is obliged to pay – from the insurer’s perspective – an extraordinarily high amount of damages. The payment is added to costs that are used to calculate future premiums not only for the tortfeasor but for the whole insurance pool, i.e. all other policy holders,<sup>76</sup> causing such to increase. Moreover, the above-described criterion of foreseeability must be duly taken into account: If the tortfeasor cannot reasonably foresee the need for insuring at the higher level, it is unfair to impose the law of the habitual residence of the victim for the compensation of the latter.
- 41 Thus, the *depeçage* solution focuses (yet again) too much on the (alleged) victim and discounts the legitimate interests of the tortfeasor. Moreover, it must be called into question whether this solution is still the application of law in general: No legislator can reasonably foresee what will happen if the prerequisites of a claim are disconnected from its results. Hence, a *depeçage* is subject to chance and thus arbitrary.
- 42 Finally, the fact that the United Kingdom has agreed to be bound by Rome II<sup>77</sup> and that the Council and Commission rejected the European Parliament’s proposal and concluded the above-mentioned agreement not to authorize the application of the law of the victim’s habitual residence but only to take it “*into*

<sup>75</sup> M. Lunney/K. Oliphant, Tort Law: Text and Materials (3rd ed. 2003) 274; T. Thiede/K. Ludwischowska, ZVglRWiss 106 (2007), 92 ff.

<sup>76</sup> See, e.g. D.J. McNamara, Automobile Liability Insurance Rates, 35 Insurance Counsel Journal (Ins. Couns. J.) 1968, 398, 401.

<sup>77</sup> Council Common Position (EC) No. 22/2006 of 25 Sept. 2006, art. 15, 2006 O.J. (C 289E) 68, 70, para. 35.

*account*” (emphasis added), must be welcomed.<sup>78</sup> In the face of the above arguments, the resulting constraint, which narrows the scope and impetus of the Parliament’s amendment considerably, should be taken seriously – otherwise *forum shopping* to English courts would be maintained in the above-described manner.

#### IV. Conclusion

Whereas some national solutions may have been the result of the demand for the protection of national citizens and may be understandable from this perspective, the European institutions recently documented a gross misunderstanding of conflict of laws in general: The subject is not a technical switch-stand for the overcoming of fundamental differences in national legal systems. It is impossible to circumvent differences resulting from a foreign element by means of policy considerations which only focus on the victim and the best indemnification for said victim. Conflict of laws is not an annex to the existing national liability rules but a coherent and delicate system in itself, which has to be understood in terms of its principles before significant changes are introduced. Hence, any change must be tested against all law-fact patterns in this area of law. Such a test is provided by all cases of divisibility and aggregation of damage and should hence be regarded in future European enterprises in this area.

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<sup>78</sup> See *M. McParland*, Tort injuries aboard and the Rome II Regulation: a brief wakeup-call for existing claims, [2008] *Journal of Personal Injury Law* (J.P.I.L.) 221; *A. Rushworth/A. Scott*, Rome II: Choice of law for non-contractual obligations, [2008] *Lloyd’s Maritime and Commercial Law Quarterly* (LMCLQ) 274, 294.